No. 08-17

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SUPREME COURT, U.S.

In the Supreme Court of the United States

LAURA MERCIER,

Petitioner,

v.

STATE OF OHIO,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Ohio

SUPPLEMENTAL BRIEF FOR PETITIONER

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This supplemental brief is filed pursuant to Rule 15.8 of the Rules of this Court to address the significance to the petition in this case of the Court's recent decision in *Arizona* v. *Gant*, No. 07-542 (Apr. 21, 2009). *Gant* adopted a narrow reading of *New York* v. *Belton*, 453 U.S. 454 (1981), holding that "police [may] search a vehicle incident to a recent occupant's arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search" or "when it is 'reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.'" No. 07-542, slip op. at 10 (citation omitted). The petition in this case was filed on July 1, 2008, and it appears that the Court has been holding the petition pending the decision in *Gant*. The petition – which presents the question whether the Fourth Amendment requires probable cause for the search of a purse being worn or held by an automobile passenger when there *is* a basis for searching the vehicle – should now be granted.

Nothing in *Gant* diminishes either the need for review in this case or the importance of the question presented by the petition. The search in this case was affirmed by the court below, not under the authority of *Belton*, but "on the authority of *Wyoming* v. *Houghton*, 526 U.S. 295 (1999)." Pet. App. 1a. And *Gant* did not disturb, or even cite, *Houghton*. The facts of this case, where police officers learned of contraband in the searched vehicle prior to execution of the search (see Pet. App. 3a-4a) are identical in the relevant respects to those of *Houghton* (where it was ""uncontested * * * that the police officers had probable cause to believe there were illegal drugs in the

car," 526 U.S. at 300) – with the crucial difference that petitioner in this case was holding her purse on her lap when she was ordered to leave it in the car so that it could be searched. The decision in *Gant* accordingly does not answer the distinct question here, on which the lower courts are deeply divided.

Gant also does not make resolution of the question presented here less important, either practically or doctrinally. Notwithstanding the adoption of a narrow reading of *Belton*, searches of automobiles carrying passengers who are not themselves suspected of criminal activity – as in *Houghton* and this case – will remain a ubiquitous feature of this country's law enforcement. Wholly apart from *Belton*, "[i]f there is probable cause to believe a vehicle contains evidence of criminal activity, *United States* v. *Ross*, 456 U.S. 798, 820-821 (1982), authorizes a search of any area of the vehicle in which the evidence might be found." *Gant*, No. 07-542, slip op. at 13. And *Gant* itself indicates "that circumstances unique to the automobile context justify a search incident to arrest when it is reasonable to believe that evidence of the crime of arrest might be found in the vehicle." *Id.* at 2.

The question here is whether such a search also may extend to a purse that is worn or held by a passenger who is not herself suspected of criminal activity. Every search of an automobile that contains a passenger may present that question. Such cases, not involving *Belton* searches, arose before the petition in this case was filed and gave rise to the conflict described in the petition (see, *e.g.*, *State* v. *Boyd*. P.3d 419, 421 (Kan. 2003) (driver's consent was the legal basis for the search of the automobile)), and have continued to arise outside the *Belton* context in the months since the petition was filed. See, *e.g.*, *United*

States v. *Mataafa*,, No 08-286, 2008 WL 5100212, at *1 (E.D. Cal. Dec. 1, 2008) (police conducted an automobile search pursuant to the terms of the driver's parole; because officers refused to allow a backseat passenger to remove her purse when she exited the car, the court concluded that the search of the purse was impermissible under the Fourth Amendment); see also *People* v. *Baker*, No. F052913 164 Cal. App. 4th 1152 (Cal. Ct. App. July 15, 2008) (holding that driver's parole agreement did not permit police to search passenger's purse).

Moreover, the question whether a purse is a "kind of 'outer clothing,' * * * which under this Court's cases would properly receive increased protection" (*Houghton*. 526 U.S. at 308 (Breyer, J., concurring) (citing *Terry* v. *Ohio*, 392 U.S. 1, 24 (1968)), is one that arises repeatedly in a wide range of non-automobile contexts that will be wholly unaffected by the decision in *Gant*. See Pet. 16-17. There is every reason to expect that such cases will continue to arise with some frequency. See, *e.g.*, *People* v. *Dorsey*, No. 2805242008, WL 5046889 (Mich. Ct. App. Nov. 25, 2008) (Fourth Amendment prohibits search of a purse held by a bystander during execution of a search warrant for a home). Resolution of the question presented here will provide essential guidance in such cases.

The conflict in state courts of last resort that is described in the petition (at 8-13) – which turns on disagreement about whether the search of a purse being worn or held by a woman amounts to a search "of the person" – has nothing whatever to do with *Belton*. That conflict is not resolved by *Gant*. Because the question remains an important one that is squarely presented by this case, further review is warranted.

For the foregoing reasons and those presented in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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